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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 46

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ROGER KESTERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI MAY 8, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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A Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the April Term, 1935, of said Court, before The Honorable Robert E. Lewis, The Honorable George T. McDermott, and The Honorable Sam G. Bratton, Circuit Judges.

[Captions omitted.]

1 In United States District Court for the Northern District of Oklahoma

No. 7887. Criminal

THE UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROGER KESTERSON AND BERNORD ROBERTS, DEFENDANTS

Indictment

Violation Section 206, Title 26, United States Code Annotated.
Filed Oct. 5, 1934

United States of America, Northern District of Oklahoma, ss.
No. 7887

In the District Court of the United States at and within the Northern District of Oklahoma, at the Special March, A. D. 1934 Term Thereof, Sitting at Tulsa, Oklahoma.

The Grand Jurors of the United States of America, duly empaneled, sworn and charged in the District Court of the United States within and for the Northern District of Oklahoma, to inquire into and due presentment make of all offenses against the laws of the United States of America, committed and triable within said district, do, upon their oaths find, present, and charge that Roger Kesterson and Bernord Roberts, whose more true, full, and correct names are to the Grand jurors unknown, in Tulsa County, State of Oklahoma, Northern District of Oklahoma and within the jurisdiction of this court, did, on or about the 17th day of August, A. D. 1934, willfully, wrongfully, unlawfully, and feloniously engage in and carry on the business of a retail dealer in intoxicating liquors, contrary to the laws of the State of Oklahoma by then and there have and possessing for retail sales certain intoxicating liquor, to-wit: Fifty-four Pints of Whiskey, at a place, to-wit: at
2 1115 South Main Street in the city of Tulsa, Tulsa County, State of Oklahoma, Northern District of Oklahoma and within the jurisdiction of this court, without having paid the special excise tax of $1,000 therefor, as required by the provisions of section 206, title 26, U. S. C. A., and contrary to the form of the

statute in such case made and provided and against the peace and dignity of the United States of America.

JOE W. HOWARD,
Assistant United States Attorney.

A True Bill.

E. J. Bowers, Foreman of the Grand Jury.

[File endorsement omitted.]

Witnesses: J. J. Steagald, Tulsa. L. D. Kern, Tulsa. D. W. Woodhouse, Tulsa.

In United States District Court

Demurrer to indictment

Filed Nov. 9, 1934

The defendants demur to the indictment on file herein upon the following grounds:

That said Indictment, upon its face, shows an alleged violation of the provisions of Section 206, Title 26, United States Code Annotated, which section is unconstitutional for the reason that same is in direct violation of Article 1, Section 8, Clause 1, of the Constitution of the United States of America.

That said section is further unconstitutional for the reason that the excise tax therein provided for is in the nature of penalty, and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate.

HICKMAN & UNGERMAN,
Attorneys for defendants.

[File endorsement omitted.]

In United States District Court

Opinion

Filed Nov. 9, 1934

Roger Kesterson and Bernard Roberts, defendants, stand charged by indictment for carrying on the business of retail liquor dealers, in violation of Section 206, Title 26, U. S. C. A. Defendants filed demurrer to indictment attacking the constitutionality of the sections of the statute providing for the payment of an excise tax of $1,000.00. Demurrer overruled.

3 Mr. C. E. Bailey, U. S. District Attorney; Mr. Chester A. Brewer, Assistant U. S. District Attorney; Mr. Joe Howard, Assistant U. S. District Attorney; for the plaintiff.

Hickman & Ungerman, Attorneys for the defendants.

Franklin E. Kennamer, District Judge. An indictment was returned into this court, charging the defendants with possession of

whiskey for sale as retail liquor dealers, within the jurisdiction of this court, without having paid the special excise tax of $1,000.00, in violation of Section 206, Title 26, U. S. C. A. The defendants have demurred to the Indictment, challenging the constitutionality of the Act of Congress, as set forth in 206, supra, because it violates the provisions of Article 1, Section 8, Clause 1, of the constitution of the United States, which reads as follows:

"Section 8. The Congress shall have power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States";

The Act of Congress under which the defendants are prosecuted provide that there shall be levied, collected, and paid annually a special excise tax of $1,000.00, in the case of every person carrying on the business of a retail liquor dealer in any state contrary to the laws of such state, or in any place therein which the carrying on of such business is prohibited by local or municipal law. Under the provisions of Section 205, Title 26, U. S. C. A., retail dealers in liquor are required to pay an annual excise tax of $25.00. It is contended the provisions of the statute requiring the payment of $1,000.00 in states where the carrying on of such business is prohibited by state law violates the uniformity provision of the constitution, because the "rate" or "amount" of an excise must be the same throughout the United States, and must operate throughout the United States uniformally from a geographical standpoint, for the reason the excise must be for the same amount or at the same rate in every state in the union wherein the subject of the excise may be found, and that the uniformity of the excise has reference to geographical uniformity.

Head Money Cases, 112 U. S. 596, 28 L. Ed. 798.
Billings v. United States, 232 U. S. 261, 58 L. Ed. 598.
Knowlton v. Moore, 178 U. S. 96, 44 L. Ed. 968.
4 LaBelle Iron Works v. U. S., 256 U. S. 377, 65 L. Ed. 998.
Patton v. Brady, 184 U. S. 622, 46 L. Ed. 713.
Brushaber v. Union Pac. R. Co., 240 U. S. 1, 60 L. Ed. 493.
Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed., 389.
United States v. Singer, 15 Wall. 118, 21 L. Ed. 49.

It is well established by the authorities above cited that the uniformity of the excise has reference to its geographical operation. I am of the opinion the statute challenged meets all the requirements of the rule established by the authorities.

Counsel for the defendant have fallen into the error of assuming that the subject of the tax is the business of carrying on that of a retail liquor dealer, and while that is part of the subject of the tax, I am unable to reach the conclusion that that is the whole subject of the tax. It would appear that the subject of the tax is that of a retail liquor dealer in a state or place within the state where such business is rendered illegal under the laws of the state. The taxes

imposed are upon an unlawful business and operate uniformally throughout the United States, where such unlawful business is engaged in. The $25.00 tax provided for under Section 205, supra, is a uniform tax provided for upon a legal business and is a uniform tax wherever such business is engaged in.

In the case of James Clark Distilling Company vs. Western Maryland R. R. Co., 242 U. S. 311, 61 L. Ed. 326, the court sustained the Webb-Kenyon Act, prohibiting the transportation of intoxicating liquors into states prohibiting the sale of such liquors, because its provisions applied to all states within the class and under the power of Congress to regulate interstate commerce.

In the case of Poe vs. Seaborn, 282 U. S. 101, 75 Law Ed. 239, the court had under consideration the constitutionality of income tax as provided for in Sections 210 and 211 of the Revenue Act of 1926. The sections provided a uniform rate of taxation on incomes, but were attacked on the ground of alleged nonuniformity, for the reason in some of the states the income of the wife belonged to the husband, while in other states the income of the wife was her own, and for that reason it was contended the tax could not be uniform throughout the United States. The Court sustained the constitutionality of the act, and in the opinion said:

"The answer to such argument, however, is that the constitutional requirement of uniformity is not intrinsic, but geographic. Billings v. United States, 232 U. S. 261, 58 L. Ed. 596, 34 S. Ct. 421; Head Money Cases (Edye v. Robertson), 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247; Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 S. Ct. 747, Any differences of state law which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity. Florida v. Mellon, 273 U. S. 12, 71 L. Ed. 511, 47 S. Ct. 265."

See Continental Illinois Bank & Trust Co. vs. United States, 65 Fed. (2) 506; Gottlieb vs. White, Collector, 69 Fed. (2) 792.

My conclusion is that the Act operates uniformally upon the subject of the tax, that is, wherever the unlawful business of a retail liquor dealer is carried on, and that the Act meets all necessary constitutional requirements.

The demurrer is overruled.

In United States District Court

Order overruling demurrer

Filed Nov. 10, 1934

Be It Remembered, that on this 9th day of November 1934 there came on for hearing before the court the demurrer filed herein by the defendants to the indictment on file in this cause, and the court having fully considered said demurrer, and having heard the argument of counsel finds that said demurrer should be overruled.

It Is Therefore Ordered by the court that the defendants' demurrer to the indictment herein be and the same is hereby in all respects overruled, with exceptions allowed the defendants.

F. E. KENNAMER,
United States District Judge.

[File endorsement omitted.]

6 In United States District Court

Judgment

On this 9th day of November, A. D. 1934, the District Court of the United States for the Northern District of Oklahoma, sitting in Special March 1934 Term at Tulsa, met pursuant to adjournment, Hon. F. E. Kennamer, Judge, present and presiding. H. P. Warfield, Clerk, U. S. District Court. C. E. Bailey, United States Attorney. John P. Logan, United States Marshal.

Public proclamation having been duly made, the following proceedings were had and entered, to wit:

Now on this 9th day of November, A. D. 1934, comes the United States Attorney, representing the Government herein and the defendants Roger Kesterson and Bernord Roberts appearing in person and by counsel Frank Hickman. The defendants are each arraigned and each enters his plea of Nolo Contendere, as charged in the Indictment heretofore filed herein; which said pleas are accepted by the court. Thereupon, all witnesses are sworn in open court and opening statements of counsel are made. The Government introduces evidence and proof with the following witnesses: L. D. Kern, J. J. Steagall, D. W. Woodhouse. And thereafter, the Government rests. Thereupon, statement of counsel Frank Hickman is made. And thereafter, after being fully advised in the premises and considering the facts and the evidence herein, it is ordered by the court that said defendants be adjudged guilty and that judgment and sentence be imposed as follows:

Roger Kesterson be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in a County Jail for a period of Six (6) months, and that he pay a fine unto the United States in the sum of Five Hundred ($500.00) Dollars, and in default thereof, further stand committed until said fine is paid or until released by due process of law.

Bernord Roberts be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in a County Jail for a period of Ninety (90) days, and that he pay a fine unto the United States in the sum of One Hundred ($100.00) Dollars, and in default thereof, further stand committed until said fine is paid or until released by due process of law.

7 And thereafter, it is ordered by the court that defendants Roger Kesterson and Bernord Roberts be given to November 13th, 1934, to file bonds on appeal herein. It is further ordered

that bond of Defendant Kesterson be set in the sum of $2,500.00; Defendant Roberts' bond, sum of $1,000.00. Said defendants to stand on present bonds until that date.

In United States District Court

Notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit

(Filed Nov. 9, 1934)

I

The names and addresses of the appellants are as follows: Roger Kesterson, 1115 South Main Street, Tulsa, Oklahoma. *Bernard* Roberts, 1115 South Main Street, Tulsa, Oklahoma.

II

The names and addresses of appellants' attorneys are as follows: Frank Hickman, 617 Ritz Building, Tulsa, Oklahoma, and Irvine E. Ungerman, 617 Ritz Building, Tulsa, Oklahoma.

III

The offense with which appellants were charged and for which they were found guilty by the trial court, a jury having been waived, is a violation of Section 206, Title 26, United States Code Annotated, same being Act of Congress of February 26, 1926, c. 27, Section 701, 44 Stat. 95, in that the appellants on or about the 22nd day of August 1934, carried on the business of retail liquor dealers at 1115 South Main Street, Tulsa, Oklahoma, and then and there possessed a quantity of whiskey, all of which is contrary to the Statutes of the State of Oklahoma, without having paid the special excise tax of $1,000.00 required by the provisions of said Act of Congress.

IV

Judgment was rendered by the court on the 9th day of November 1934, and the appellant, Roger Kesterson, was sentenced to six months imprisonment and assessed a fine of $500.00 and the appellant, *Bernard* Roberts, was sentenced to ninety days imprisonment and assessed a fine of $100.00.

V

8 We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

ROGER KESTERSON,
BERNORD ROBERTS,
Appellants.

Dated this 9th day of November 1934.

The grounds of appeal are as follows:

The appellants demurred to the indictment upon the ground and for the reason that said Act of Congress is unconstitutional in that it violates the provisions of Article 1, Section 8, Clause 1 of the Constitution of the United States, in that the excise tax therein provided for is not a uniform excise as required by the Constitution and does not operate generally throughout the United States, and upon the further ground that the excise tax therein provided for is in the nature of a penalty in connection with matters over which Congress has no authority to legislate. The demurrer of the defendants was overruled by the court and exceptions allowed. Thereupon, a jury having been waived, the court heard the evidence and found the appellants guilty of a violation of said Act of Congress. The appellants appeal upon the ground that said Act of Congress is unconstitutional and that the trial court erred in overruling their demurrer to the indictment and in finding them guilty of a violation of said Act of Congress and sentencing them accordingly.

FRANK HICKMAN,
IRVINE E. UNGERMAN,
Attorneys for Appellants.

Service of a copy of the foregoing notice is hereby acknowledged to have been made this 9th day of November, 1934.

C. E. BAILEY,
United States Attorney.

[File endorsement omitted.]

Recital as to bonds

[Supersedeas bonds, approved by the trial judge, with appellants as principals and John W. Riley, Ashley Russell, and
9 Jessie E. Hensley as sureties on each of said bonds, were filed in the District Court on Nov. 13, 1934, as to Bernord Roberts in the sum of 1,000 and as to Roger Kesterson in the sum of $2,500.]

In United States District Court

Order and direction to clerk for record on appeal

Filed Nov. 10, 1934

Now on this 9th day of November, 1934, the clerk of this court having brought to the attention of the court that the defendants herein have served and filed with him their notice of appeal from the judgment and orders made in this cause on the 9th day of November, 1934, and counsel for all parties herein now appearing before the court for an order of the court to the clerk of the court with regard to the preparation of the record on appeal as required by the rules of the Supreme Court of the United States promulgated May 7, 1934, and the court having been advised in the premises.

It Is Ordered that the clerk of this court include in the record or transcript for appeal the following:

1. The indictment herein.
2. The demurrer to the indictment.
3. Order overruling demurrer.
4. Opinion filed by the court herein.
5. Arraignement and plea.
6. Judgment and sentence.
7. Notice of appeal.
8. Supersedeas bonds.
9. This order.
10. Transcript of clerk's minutes as appears on his docket.
11. Certificate of clerk.

F. E. KENNAMER,
United States District Judge.

[File endorsement omitted.]

10 In United States District Court

Clerk's docket entries

Oct. 5, 1934. Ent. return Grand Jury with indictment, order to file and for warrant.
Filed indictment. Ent. order fixing bond at $
Filed bonds of Roger Kesterson, $3,500.00, and Bernord Roberts $500.00.
Filed record of vote of Grand Jury.
Oct. 18, 1934. Enter order cause set for trial for 11-9-34.
Nov. 9 " File demurrer of defendants.
" 9 " File memorandum opinion on defendants demurrer.
" 9 " File and enter order demurrer of defendants overruled, exception allowed. (F. E. Kennamer, Judge.)
" 9 " Defts. both arraigned—each plea of Nolo Contendere—statements made—witnesses sworn and examined—Found guilty as to each Deft.
Judg. and sent—Roger Kesterson: 6 Mo. Co. Jail to custody of Atty. Gen. or his authorized rep.—Fine $500.00.
Judg. and sent—Bernord Roberts: 90 days Co. Jail to custody of Atty. Gen. or his authorized Rep.—Fine $100.00.
Ent. order Defts. given till 13th to file bonds on appeal—appeal bonds fixed at $2,500.00 for Kesterson and $1,000.00 for Roberts—Defts. to stand on present bonds till 13th (or till appeal bonds filed—)
" 9 " File notice of appeal to U. S. C. C. A. for 10th Circuit.
" 10 " File and enter order of 11-9-34, and direction to clerk for record on appeal (F. E. Kennamer, Judge.)
" 13 " File supersedeas bond of *Bernard* Roberts, Amt. $1,000.00, approved, F. E. Kennamer, Judge.
" 13 " File supersedeas bond Roger Kesterson, Amt. $2,500.00 approved, F. E. Kennamer, Judge.

11 [Clerk's certificate to foregoing transcript omitted in printing.]

12 *In United States Circuit Court of Appeals for the Tenth Circuit*

Order of submission January 29, 1935

Before Honorable Robert E. Lewis, Honorable George T. McDermott, and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard and was argued by counsel, Frank Hickman, Esquire, appearing for appellants, Joe W. Howard, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

13 In United States Circuit Court of Appeals, Tenth Circuit

April term, 1935

No. 1176

ROGER KESTERSON AND BERNORD ROBERTS, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Oklahoma

Frank Hickman (Hickman & Ungerman were with him on the brief), for appellants.

Joe W. Howard, Assistant United States Attorney (C. E. Bailey, United States Attorney, was with him on the brief), for appellee.

Before LEWIS, MCDERMOTT, and BRATTON, Circuit Judges

Opinion April 8, 1935

LEWIS, Circuit Judge, delivered the opinion of the court.

14 An indictment returned against appellants charged them with carrying on the business of a retail liquor dealer in Tulsa, Oklahoma, on August 17, 1934, contrary to the laws of said state, without having paid the special excise tax of $1,000 as required by 26 U. S. C. A., Sec. 206.

Section 205 (a), 26 U. S. C. A., prescribes a $25 tax for retail liquor dealers, while said section 206 prescribes a $1,000 tax for retail liquor dealers where state or local law prohibits the carrying on of such business.

Appellants challenged the constitutionality of the statute by demurrer upon these grounds: (1) That said section 206 is violative of

Article I, Sec. 8, Clause 1 of the United States Constitution. (2) That the tax provided by said section is in the nature of a penalty, and not for the purpose of raising revenue.

The court below overruled the demurrer, and held section 206 levying a special excise tax of $1,000 did not violate the constitutional requirement of uniformity, notwithstanding section 205 levied an annual excise tax of $25 on retail dealers, because section 206 operates uniformly throughout the United States wherever the unlawful business of retail liquor dealers is carried on. The opinion may be found in 8 F. Supp. 680.

The Twenty-first Amendment which repealed the Eighteenth Amendment of the Constitution was ratified December 5, 1933. Thereupon the Eighteenth Amendment became inoperative. The National Prohibition Act, to the extent its provisions rested upon the grant of authority to Congress by the Eighteenth Amendment, immediately fell. United States v. Chambers, 291 U. S. 217.

The authority of Congress thereafter to prescribe this $1,000 levy must be found in Article I, Section 8, Clause 1, of the Constitution, which authorizes Congress to enact revenue measures. It requires that excise taxes shall be uniform throughout the United States. Counsel argue the applicability of numerous Supreme Court decisions which hold that constitutional uniformity means geographical uniformity, but they do not discuss the primary question of whether section 206 prescribes a tax or a penalty.

15 In passing upon section 206 we must have proper regard for the right of Congress to enact revenue measures and must construe the act, if fairly possible, to be constitutional. At the same time we must remember that Congress derives its power to legislate from the Constitution. The exaction of $1,000 under said section upon retail liquor dealers where the business is unlawful necessarily serves to restrain and regulate. Taxing statutes have been sustained where the courts have been able to say that the statute was primarily a revenue measure, although Congress had the incidental motive of discouraging the subject of the tax.

Mr. Justice Day, in United States v. Doremus, (1918) 249 U. S. 86, summarized much of the law up to that time. By the Harrison Narcotic Drug Act Congress undertook to regulate the sale of narcotic drugs in the United States. The act imposed a special tax on the manufacture, importation, sale or gift thereof. It aimed by the imposition of penalties to confine the sale of drugs to registered dealers, to physicians, and to persons with prescriptions. The law provided for registration, keeping of records, and the giving of prescriptions. Doremus, a physician, was indicted for dispensing to a "dope fiend" a certain quantity of heroin without a written order required on a form issued by the Commissioner of Internal Revenue and not in the course of his practice. Upon demurrer to the indictment the District Court held the act unconstitutional for the reason that it was not a revenue measure, and was an invasion of the police

power reserved to the states. The lower court was reversed. The court said in part:

"The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared that it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. License Tax Cases, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power
16 exert a thority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. Veazie Bank v. Fenno, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. McCray v. United States, 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see Flint v. Stone Tracy Co., 220 U. S. 107, 147, 153, 156, and cases cited.

"Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. License Tax Cases, 5 Wall., supra.

"The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. In re Kollock, 165 U. S. 526, 536.

"The legislation under consideration was before us in the case concerning sec. 8 of the act, and in the course of the decision we said: 'It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right'."

The court concluded that the provisions as to registration, the keeping of records, and prescriptions had a proper relation to the raising of revenue. Four Justices dissented from that conclusion

The Harrison Narcotic Drug Act has since been regarded
17 as valid as a revenue measure, but in Linder v. United States, 268 U. S. 5, at 17, Mr. Justice McReynolds warns:

"Congress cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the power reserved to the States, is

invalid and cannot be enforced. McCulloch v. Maryland, 4 Wheat. 316, 423; License Tax Cases, 5 Wall. 462; United States v. DeWitt, 9 Wall. 41; Keller v. Unitied States, 213 U. S. 138; Hammer v. Dagenhart, 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20."

Penalties and taxes are considered in the Child Labor Tax Case, 259 U. S. 20. By the Child Labor Tax Congress imposed an "excise tax" equivalent to 10% of the net profits for the year upon any person employing child labor in violation of the statute regulating such employment. The Drexel Furniture Company of North Carolina sued to recover back a tax paid under protest for violation of said act. Plaintiff recovered in the District Court, and the judgment was affirmed. In delivering the opinion of the court Mr. Chief Justice Taft said at page 36 et seq.:

"The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function, under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by Sec. 8, Article I, of the Federal Constitution. * * * Does the law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the
18 so-called tax as a penalty? If a tax, it is clearly an excise.

If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. * * * Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

"Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in

the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.

"Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us."

In Hill v. Wallace, 259 U. S. 44, the act regulating by taxation the business of grain exchanges was held unconstitutional. In Lipke v. Lederer, 259 U. S. 557, so-called taxes retained in force and imposed by section 35 of the National Prohibition Act upon dealing in liquor prohibited and made criminal by the act were held to be in reality penalties.

"The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. Child Labor Tax Case. When by its very nature the inposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605. Evidence of crime (Sec. 29) is essential to assessment under Sec. 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of law—the definite function of a penalty. O'Sullivan v. Feliz, 233 U. S. 318, 324."

Section 206 (44 Stat. 95) was passed while we had the Eighteenth Amendment and National Prohibition, and most states had their own prohibition laws. By payment of the $1,000 "special excise tax" the taxpayer acquired no license or authority to carry on the business of retail liquor dealer contrary to state or local prohibitory laws (License Tax Cases, 5 Wall. 462), nor did he acquire a license authorizing him to violate the National Prohibition Act, as long as it remained the law. It is apparent we think that the $1,000 exaction was prescribed as a regulatory measure to provide an additional penalty. At the time charged in the indictment the tax in "wet" territory was, theretofore had been, and since has been only $25. The main purpose of making it forty-fold in "dry" territory was, it seems to us, to aid in the suppression of dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment. Several courts have decided recently that the $1,000 exaction is a penalty and not a tax. Cleveland v. Davis (S. D. Ala.) 9 F. Supp. 337; Green v. Page, Collector (S. D. Ga.) decided January 8, 1935; Constantine v. United States (C. C. A. 5) decided March 15, 1935.

Counsel press on our attention the first issue raised by the demurrer. Inasmuch as we are of opinion that said section 206 provided a

penalty and not a tax, it seems unnecessary to determine whether that section violated the uniformity requirement of the Constitution.

Reversed with directions to vacate the judgment and enter an order discharging appellants.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

21 In United States Circuit Court of Appeals, Tenth Circuit

Judgment April 8, 1935

Before Honorable Robert E. Lewis, Honorable George T. McDermott, and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgments and sentences of the said district court in this cause be and the same are hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to vacate the judgment and enter an order discharging appellants.

Clerk's note re mandate

[On April 27, 1935, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Court.]

25 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

No. 46, October term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument immediately following no. 40.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File no. 39,581. U. S. Circuit Court of Appeals, Tenth Circuit. Term no. 46. The United States of America, petitioner, vs. Roger Kesterson and Bernord Roberts. Petition for a writ of certiorari and exhibit thereto. Filed May [illegible], 1935. File no. 46 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: [illegible]